

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202		
MICHAEL CERBO, Complainant, vs. PROTECT COLORADO JOBS, INC. Respondent.		▲ COURT USE ONLY ▲ CASE NUMBER: OS 20080017
AGECNY DECISION		

Procedural History

This matter is before the Office of Administrative Courts on the complaint of Michael Cerbo (“Complainant”) against Protect Colorado Jobs (“PCJ” or “Respondent”). Complainant was represented in these proceedings by Mark G. Grueskin, Esq. Respondent was represented by Scott E. Gessler, Esq. The complaint was filed with the Colorado Secretary of State (“Secretary”) on June 11, 2008. On June 12, 2008 the Secretary referred the complaint to the Office of Administrative Courts as required by Colo. Const. art. XXVIII, § 9(2)(a). The case was referred to Administrative Law Judge (“ALJ”) Michelle A. Norcross and hearing was set on June 27, 2008 in Denver, Colorado.

Based on motions filed by both the Complainant and Respondent requesting that the June 27 hearing be continued, the case was reset for hearing on September 23, 2008. At the end of August and beginning of September 2008, the ALJ received several Motions for Protective Orders regarding subpoenas that were issued to: Andrew Zuppa, Jonathan Coors, and Ryan Frazier. The parties requested a forthwith hearing regarding the pending motions. A motions hearing was held on September 22, 2008. At the hearing, Mr. Gessler appeared on behalf of Mr. Frazier; Thomas C. Bell, Esq. appeared on behalf of Mr. Coors; Gary J. Benson, Esq. appeared on behalf of Mr. Zuppa; and Mr. Grueskin appeared on behalf of the Complainant. At the hearing, the ALJ granted the motions filed by Mr. Coors and Mr. Zuppa and denied the motion filed by Mr. Fraizer.

On September 18, 2008, Respondent filed a Motion to Stay the September 23, 2008 administrative proceeding on the basis that PCJ filed a complaint in Denver District Court on September 15, 2008, making a facial challenge to the constitutionality of Colorado’s campaign finance laws as they govern issue committees. On September 19, 2008, the parties filed a Stipulated Motion to Suspend the Hearing on Merits. Based on the stipulated motion, at the September 22, 2008 motions hearing, the ALJ vacated the September 23, 2008 hearing and denied the Motion to Stay as moot. The hearing

was reset on December 12, 2008. On December 8, 2008, the ALJ received an Unopposed Motion to Use Deposition and Hearing Transcripts in Lieu of Witness Testimony for the December 12, 2008 Hearing. At the December 12, 2008 hearing the ALJ granted the motion and received into evidence: a) the certified copy of the Transcript of Proceedings on July 29, 2008 re: In the Matter of the Complaint filed by Michael Cerbo Regarding Alleged Campaign and Political Finance Violations by the Colorado Right-to-Vote Committee, Case No. OS 20080007, including all admitted hearing exhibits; b) Original deposition transcript of Julian Jay Cole dated September 17, 2008, including all deposition exhibits; c) Original deposition transcripts of Ryan Frazier dated November 26, 2008 (Volume I) and December 10, 2008 (Volume II), including all deposition exhibits. Additionally, the parties stipulated to the following facts: 1. As of the December 12, 2008, PCJ had not register as an issue committee with the Secretary; and 2. PCJ had not filed any reports of contributions and/or expenditures.

The parties' requested that the record remain open for the submission of written closing arguments. Complainant filed his closing argument on December 31, 2008. Respondent filed its closing argument on January 14, 2009. Complainant filed his reply on January 20, 2009. The record was closed on January 21, 2009.

Parties' Positions

Complainant: Complainant argues that Respondent violated the registration and reporting requirements of the Fair Campaign Practices Act ("FCPA") by failing to register as an issue committee with the Secretary and by failing to file reports of contributions and expenditures. Complainant seeks the imposition of penalties against Respondent in the amount of \$37,550 for the alleged violations.

Respondent: Respondent contends that does not meet the definition of an "issue committee" as provided in § 2(10) of Article XXVIII of the Colorado Constitution and therefore it had no duty to register with the Secretary or file reports of contributions and expenditures. Respondent requests that the ALJ dismiss Complainant's complaint.

FINDINGS OF FACT

Based on the Stipulated Record provided by the parties, the ALJ make the following Findings of Fact:

1. In June 2007, Ryan Frazier and Jay Cole ("proponents") began working on proposed ballot initiative #38, Prohibition on Certain Conditions of Employment ("Initiative #38). The proponents hired John Berry, Esq. to assist them in their efforts to draft Initiative #38. Curt Cervený was also involved in the drafting and oversight of Initiative #38. Mr. Cervený is the owner of a political consulting firm called Politically Direct; he is also the president of PCJ. Mr. Cervený was also involved in the activities of the issue committee registered as Colorado Right to Work Committee ("CRTWC").

CRTWC was registered as an issue committee with the Secretary on November 19, 2007.

2. At a title board hearing on August 1, 2007, title was set for Initiative #38. On August 15, 2007, a motion for rehearing was granted. Initiative #38 was withdrawn by the proponents on September 11, 2007.

3. On September 11, 2007 the proponents submitted proposed ballot initiative #41, Prohibition on Certain Conditions of Employment (Initiative #41) with the Office of Legislative Council. The proponents as well as Messrs. Berry and Cerveny were responsible for the drafting and filing of Initiative #41.

4. Initiative #41 was filed with the Secretary on September 17, 2007. At a title board hearing on October 3, 2007, title was set for Initiative #41. The ballot title was fixed on October 10, 2007, when the period for filing a motion for rehearing expired. Initiative #41 became Amendment 47 on April 28, 2008 when the Secretary deemed a random sampling of petition signatures sufficient for such a designation. Mr. Berry represented the proponents at both title board hearings and testified in both proceedings for Initiatives #38 and #41.

5. In addition to his work for the proponents of Initiatives #38 and #41, Mr. Berry assisted Mr. Cerveny and Lee Chayet in organizing, forming and incorporating PCJ. PCJ was incorporated as a non-profit 501(c)(4) corporation on May 4, 2007. Mr. Cerveny is the president of PCJ; Mr. Chayet is its vice president; and Mr. Berry is PCJ's secretary/treasurer and registered agent. Mr. Cerveny is solely responsible for the financial affairs of PCJ and ultimately makes all the decisions about where and how PCJ spends its money.

6. PCJ was created for the purposes of: promoting and protecting businesses in Colorado, providing an educational forum for Colorado's businesses and promoting Colorado's economic climate. PCJ received funding through contributions from various donors. Initially, PCJ's fundraising efforts produced little money. Its fundraising picked up considerably in November 2007 after Governor Ritter issued an executive order concerning labor activities in the state of Colorado.

7. In furtherance of its mission, PCJ began working on a newsletter to distribute to nearly 65,000 businesses in Colorado. As of July 29, 2008, PCJ had not yet completed or the published its newsletter. In addition to working on a newsletter, PCJ's officers had monthly meetings to discuss other activities PCJ would become involved in. Specifically, the officers discussed getting involved in a statewide gambling ballot initiative and setting up a political blog website. Ultimately, PCJ did not get involved with the gambling initiative and it did not establish a political blog website. It continued, however, to work on its newsletter and had plans to publish a mailing in the 6th Congressional District.

8. Between October 10, 2007 and April 20, 2008, it is undisputed that PCJ spent most of its time and money on getting Initiative #41 on the statewide ballot. Specifically, after the title was fixed on October 10, 2008, PCJ spent over \$250,000 on activities that were directly related to the support of Initiatives #41. Most of the money was contributed directly to CRTWC.

9. On November 20, 2007, Mr. Cerveney, as Chairperson of PCJ, made arrangements to begin the signature collection process. In November 2007, Mr. Cerveney and Mr. Daniel Kennedy of Kennedy Enterprises ("Kennedy") began negotiations regarding the collection of signatures. Based on the outline of this quote, on December 10, 2007 Mr. Cerveney and Mr. Kennedy entered into a contract for the collection of signatures.

10. The December 10, 2007 contract provided for the payment of \$180,000 to Kennedy by PCJ for collection of 80,000 signatures.

11. In order to obtain all the signatures required, Kennedy subcontracted some of the work to a group called Lamm Consulting ("Lamm"). Per the terms of the December 10, 2007 contract, PCJ paid \$20,000 to Lamm in December 2007; the check was deposited in Lamm's account on December 10, 2007. PCJ also paid Kennedy a \$25,000 non-refundable retainer around December 24, 2007; the \$25,000 check was deposited in Mr. Kennedy's account on December 27, 2007. There is no evidence that PCJ made any more direct payments to Kennedy or Lamm for signature gathering after December 2007.

12. In December 2007, Mr. Cerveney delivered to Mr. Kennedy between 100 and 200 petitions along with a list of talking points for the circulators to use in explaining the measure to the potential signers. Mr. Cerveney prepared the first batch of petitions and talking point materials that were delivered to Mr. Kennedy in December 2007.

13. Between the services of Lamm and Kennedy during the month of December 2007, nearly 5,300 signatures were obtained and turned over to PCJ on January 11, 2008.

14. The signatures collected by Kennedy were turned over to an individual named Andrew Zuppa, a designated representative of PCJ.

15. A report of contributions and expenditures filed by CRTWC for the reporting period January 1, 2008 – April 25, 2008, shows that PCJ made 13 separate contributions to CRTWC totally \$248,050.

16. As of December 12, 2008, PCJ had not registered as an issue committee with the Secretary or filed any reports of contributions and/or expenditures.

DISCUSSION

Complainant asserts that Respondent violated Colorado's campaign finance laws by failing to register as an issue committee and by failing to comply with the reporting requirements of the FCPA. Article XXVIII defines an "issue committee" as, "any person, other than a natural person, or any group of two or more persons, including natural persons that has a major purpose of supporting or opposing any ballot issue or ballot question *or*¹ that has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." Colo. Const. art. XXVIII, § (2)(10)(a)(I) and (II).

The Secretary's rules, specifically 8 CCR 1505-6, Rule 1.6, define when an proposed ballot initiative becomes an "issue" for purposes of § 2(10).

Rule 1.6 provides:

"Issue", as used in Article XXVIII of the Colorado Constitution and Article 45 of Title 1, C.R.S., shall mean a "ballot issue" or "ballot question" as such terms are defined in section 1-1-104(2.3) and (2.7), C.R.S. For the purpose of Article XXVIII, section 2(10) of the Colorado Constitution, a matter shall be considered an "issue" at the earliest of the following:

- a. It has had a title designated and fixed in accordance with law;
- b. It has been referred to the voters by a governing body or the general assembly;
- c. In the case of a citizen referendum petition, it has been submitted for format approval in accordance with law;
- d. A petition has been circulated and signed by at least one person; except that, where a matter becomes an "issue" upon such signing, a person or persons opposing such issue shall not be considered an "issue committee" until one such person knows or has reason to know of the circulation; or
- e. A signed petition has been submitted to the appropriate election official in accordance with law.

¹ 8 CCR 1505-06, Rule 1.7 b (a group of persons is an issue committee only if it meets both of the conditions in Article XXVIII, Section 2(10)(a)(I) and 2(10)(a)(II).)

In accordance with Rule 1.6 a, the proposed ballot Initiative #41 became an “issue” on October 10, 2007, when the period for filing a motion for rehearing with the title board expired. In determining whether PCJ had a major purpose of supporting or opposing a ballot issue or ballot question, the ALJ may consider a number of factors, including: the length of time the entity has been in existence; the entity’s original purpose; the various issues with which the organization has been involved; and the amount of money spent on campaign materials in proportion to its total budget. *Independence Institute v. Coffman*, ___ P.3d ___, slip op. at 19-20, (Colo. App. 2008) (Case No. 07CA1151) (decided November 26, 2008).

In the instant case, there is no question that after October 10, 2008, getting the right-to-work initiative on the ballot was a big part of PCJ activities. PCJ undertook several activities to help get the initiative on the ballot, including initially contracting with Kennedy and Lamm to obtain signatures, paying for the signature collections that took place in December 2007, preparing some of the petitions and informative materials related to Initiative #41 and contributing a large sum of money to CRTWC. The ALJ is mindful, however, that PCJ was formed nearly six months before the right-to-work initiative became a ballot issue and had discussions and plans to become involved in other activities not related to the right-to-work initiative. That PCJ did not end up focusing its efforts on a state-wide gambling initiative, developing a political blog website, or publishing its newsletter by the summer of 2008, does not diminish the fact that these discussions took place with the officers of PCJ and that PCJ was formed with the intent to become involved with other business-related activities around the state other than just supporting the right to work initiative.

Complainant argues that Mr. Cerveny’s vague description of PCJ’s purpose has little relevance to the determination of whether PCJ was an issue committee and that reliance on the organization’s own assessment of its original purpose would essentially make a mockery of campaign finance reform. (Complainant’s Closing Argument, page 4, citing *League of Women Voters of Colorado v. Davidson*, 23 P.3d 1266, 1275 (Colo. App. 2001)). In *League of Women Voters*, the court cautioned relying solely on the organization’s stated purposes to determine if the organization was a “political committee”. At the same time, the court held that the organization’s own stated purpose was at least one criterion upon which to determine whether it was a “political committee”. *Id.* at 1275. Therefore, the statements of Mr. Cerveny and Mr. Berry as to PCJ’s stated purpose, while not conclusive, can, should, and have been considered by the ALJ in determining PCJ’s purpose. Complainant further contends that Mr. Cerveny was not a credible witness on this point and that his testimony should not be relied on. Yet, Complainant presented no evidence to contradict Mr. Cerveny’s testimony about the activities of PCJ. Moreover, Mr. Cerveny’s testimony about PCJ’s activities was supported by the testimony of Mr. Berry, who the ALJ finds to be a credible witness.

Whether or not PCJ had a major purpose of supporting or opposing a ballot issue or ballot question is largely a factual determination. The record before the ALJ, as presented by the parties, is insufficient to establish that PCJ had a major purpose of

supporting Initiative #41.² PCJ was formed before the right-to-work initiative became a ballot issue. It was established for purposes other than to support a right-to-work initiative and it was involved in business-related activities in the state other than just the right-to-work initiative. Further, absent sufficient evidence to the contrary, the ALJ accepts the testimony of Mr. Cervený and Mr. Berry about PCJ's activities and its mission. The ALJ concludes that Complainant has not established by a preponderance of the evidence that PCJ was an issue committee as defined in § 2(10) of Article XXVIII. As such, Respondent was not required to register as an issue committee or file reports of contributions or expenditures with the Secretary.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const. art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.
2. The issues in a hearing conducted by an ALJ under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII, or Section 1-45-108, 114, 115, or 117, C.R.S. (2008). Colo. Const. art. XXVIII, § 9(2)(a). If an ALJ determines that a violation of one of these provisions has occurred, the ALJ's decision must include the appropriate order, sanction or relief authorized by Article XXVIII. Colo. Const. art. XXVIII, § 9(2)(a).
3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)³. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against the Respondent for violations of the Colorado Constitution and the FCPA. Accordingly, Complainant has the burden of proof.
4. Complainant has not established, by a preponderance of the evidence, that Respondent was an issue committee as defined in § 2(10), Article XXVIII of the Colorado Constitution.
5. Complainant has not established, by a preponderance of the evidence, that Respondent violated §§ 1-45-108(3) and 1-45-108(1)(a)(I), C.R.S. by failing to register as an issue committee or file reports of contributions or expenditures with the Secretary.

² Because the ALJ has concluded that PCJ did not have a major purpose of supporting or opposing a ballot issue or ballot question, the ALJ does not need to address whether PCJ accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

³ Section 24-4-101, *et seq.*, C.R.S. (2008)

AGENCY DECISION

It is the Agency Decision of the ALJ that Complainant has failed to establish by a preponderance of the evidence that PCJ was an issue committee. Complainant's complaint is hereby dismissed.

This decision is subject to review with the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

DONE and SIGNED

February 4, 2009

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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DATED: _____

Court Clerk